United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7622

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

JAY JULIEN,

Plaintiff-Appellant,

—against—

SOCIETY OF STAGE DIRECTORS AND CHOREOGRAPHERS, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7622

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JAY JULIEN,

Plaintiff-Appellant,

-against-

SOCIETY OF STAGE DIRECTORS AND CHOREOGRAPHERS, INC.

Defendant-Respondent.

----------X

BRIEF FOR PLAINTIFF-APPELLANT

Plaintiff appeals from an order and a judgment, (364A), (all citations to a page "A" are to page of the appendix,) entered on October 10, 1975, (Stewart, J.) which dismissed the complaint of the plaintiff.

NATURE OF ACTION

This action was brought on the ground that defendant is in violation of U. S. Code Title 15 Section 1 (Sherman Anti-Trust Act). Plaintiff seeks to enjoin defendant from enforcing an agreement, and from actions, which are in unlawful restraint of trade. Plaintiff also seeks damages pursuant to U. S. Code Title 15 Section 15.

BACKGROUND FACTS

Plaintiff is a producer of first class stage productions. (Ex. 3; 328A) Defendant is an organization of directors and choreographers, (Ex. 328A) the members of which direct and choreograph first class stage productions. Defendant has entered into agreements ("Agreements") with The League of New York Theatres, Inc. ("League") which are industry wide, apply to interstate commerce throughout the United States, and set minimum fees and other minimum terms under which a director ("Director") of a first class stage production ("Production") will perform services for a producer ("Producer") of a Production. A basic minimum agreement was first entered into on August 13, 1962 between the League and the Defendant. The said agreement was renewed on August 13, 1972, with quantitative changes, but without any change pertinent to the issues in this action. (Ex. 1, 276A; & 2, 297A) The Agreements and the Defendant require that only members of defendant be engaged as Directors. (Ex. 2 & 3, 276A, 297A) Substantially all Productions throughout the United States are directed by members of defendant and are subject to the Agreements. (Ex. 3; 328A)

Plaintiff has been, and continues to be, prevented by defendant from producing a play except in accordance with the terms of the Agreements. (48A-49A) He seeks to enjoin this restraint as being an unlawful violation of the

Sherman Act.

THE QUESTION INVOLVED

The sole question is whether Directors are subject to the provisions of the Sherman Act, which provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, . . . is declared to be illegal . . ." (U. S. Code Title 15 Section 1.)

There is no dispute but that the Agreements and the actions of the defendant impose minimum fees and other minimum terms for Productions throughout the United States. (Ex. 3, 328A.) There is therefore a violation of the Sherman Act unless defendant is exempt from the Sherman Act proscriptions by virtue of the Clayton Act or the Norris-LaGuardia Act. Exemptions from the prohibitions of the Sherman Act "will not apply unless an employer-employee relationship is 'the matrix of the controversy.'" (Ring v. Spina, 148 F 2d 647, 650.)

The only question, therefore, is whether a Director is an independent contractor or an employee. If an independent contractor, he is subject to and in unlawful violation of the Sherman Act; if an employee, he is exempt from the Sherman Act.

BASIS FOR APPEAL

This appeal is taken on the grounds that the facts which are agreed upon by the parties, and the facts

testified to by the defendant's witnesses, even apart from the testimony by plaintiff's witnesses, establish that a defendant is an independent contractor, not an employee. In addition, the evidence submitted by plaintiff which was not controverted by defendant fully substantiates that a Director is an independent contractor.

POINT I

STANDARD FOR DETERMINING WHETHER A PERSON IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR IS THE AMOUNT OF CONTROL EXERCISED BY THE PERSON FOR WHOM THE WORK IS DONE OVER THE MANNER IN WHICH THE WORK IS DONE

The principle which is applicable to determine whether a person is an independent contractor or an employee has been succinctly stated in Taylor v. Local 7, 353 F 2d 593. (4th Cir, 1965. Cert. denied, 384 U. S. 969.) The Court there stated:

> "The usual test employed for determining whether one performing services for another is an independent contractor or an employee is found in the nature and amount of control by the person for whom the work is done. The rule was clearly enunciated in Singer Mfg. Co. v. Rahn, 132 U. S. 518 . . . The Court at page 523 . . . stated:
>
> "'. . . (t)he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished . . .'

"Complete control over the result to be accomplished is not enough to make an independent contractor an employee. As stated in National Labor Relations Board v. Steinberg, 182 F. 2d 850, 856-857 (5 Cir. 1950):

"'. . . an employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee.

"Even some reservation of control to supervise the manner in which the work is done, or to inspect the work during the performance does not destroy the independent contractor relationship where the contractor is not deprived of his judgment in the execution of his duties." (Taylor v. Local 7, 353 F. 2d 593, 594. 4th Cir. Cert. denied, 184 U. S. 969.)

The only question, therefore, is what is the nature and amount of control that a Producer retains over the work done by the Director. The specific question is whether a Producer "retains the right to direct the manner in which the business shall be done". It is submitted that even if the only evidence before the Court were the facts agreed to by both parties and the testimony of the defendant's witnesses, these would confirm that a Producer does not have or "retain the right" to direct the manner of a Director's work.

The principles stated in Taylor are the same as the principles that have been held to apply in the theatre industry or profession. Thus, in Ring v. Spina, (118 F 2d 647, 2d Cir. 1945.) the plaintiff had invested in a play that was to be produced. He attempted to enjoin the defendants, authors of the theatrical production, and The Dramatists Guild of the Authors League of America, Inc. which represented substantially all the playwrights in the country, from proceeding to arbitration or otherwise enforcing a Basic Agreement. The Dramatists Guild claimed to be a labor union and therefor exempt from the proscriptions of the Sherman Act. The Court of Appeals, Second Circuit, reversed the District Court (which had denied a motion for an injunction pending trial) and remanded the case for proceedings consistent with the opinion of the Court of Appeals. That opinion held, inter alia, that much more was involved than an agreement for the production of a single play; that under attack was a broad plan for controlling dramatic productions of the country.

> "So far as the moving papers go, they thus show that this is in fact a system of control of theatrical productions wherever produced or transported throughout the country and even in foreign lands." (Page 651.)

The principle enunciated in Ring is the same as that stated in Taylor: that the exception to the Sherman Act "will not apply unless an employer-employee relationship is 'the matrix of the controversy'". Clearly that principle applies to issues arising in the theatre industry.

The same issue involving the theatrical industry was before the Southern District in an anti-trust action brought by the government. (United States v. United Scenic Artists Local 829, 27 F.R.D. 499, 1961.) The government contended that the defendant union had combined and conspired with those of its members who entered into individual scenery and costume design contracts with producers to restrain interstate commerce in violation of the Sherman Act. The government sought an injunction, and both sides moved for summary judgment. The Court held that the depositions and affidavits did not provide enough information concerning the facts in dispute, and the issues should not be determined without a trial. However, again, the principles enunciated were the same as in Taylor. The government charged the union with prohibiting certain members from performing services unless designs were prepared by a union member, of fixing

minimum fees, and of other violations of the Sherman Act. The principal defense was that costume and scenery designers were employees of producers and therefore were exempt from the Sherman Act by virtue of the Clayton Act. The government claimed that the designers were independent contractors. The Court held that the employment question was the crux of the controversy and the matter could not be resolved on summary judgment because there was a factual issue with respect to:

> "perhaps the most important factor in this determination - the nature of the relationship between the designers and the producers, and the extent and manner of control exercised in practice by the producers over the designers." (Page 502)

The principle was again clearly held applicable to the theatre industry.

Thus, the Courts have held that the theatrical industry is subject to the prohibitions of the Sherman Act except where there is an employer-employee relationship. It is submitted that the facts which are not disputed establish that there is no employer-employee relationship between Producers and Directors.

POINT II

TESTIMONY OF DEFENDANT'S WITNESSES ESTABLISHES FACTS THAT CONFIRM THAT THE MANNER OF WORK OF A DIRECTOR IS NOT SUBJECT TO CONTROL BY PRODUCER

In agreed findings of facts (Ex. 3, 328A), the parties were in accord that a Director's work on a Production is as follows:

Directors generally complete each engagement as follows:

(a) The average preparation prior to rehearsal is about four weeks to six months (but may be as long as two years);

(b) Rehearsals in about four to five weeks;

(c) Try-out period in one to five weeks;

(d) Periodic checkups during run of the play for brush up rehearsals and cast replacement, but only if and when the Director is not otherwise professionally engaged;

(e) During the period of preparation, a Director is permitted to and frequently does work on other Productions or other endeavors.

He auditions actors and then with the Producer, and sometimes with the playwright also, chooses them to play the roles of the play. (238A-239A) He rehearses the actors with each other in the play and sometimes by themselves in order to set the mood and meaning of the play. He will, together with the producer, determine which actors shall be discharged in the course of production. (256A-257A) Prior to the commencement of rehearsals there is a preparation period during which the Director will devote anywhere from a month to a year or two,

usually about six months, to working with the playwright and the producer in order to revise the play to suit all three. (Ex. 3, 328A) He stages the play; he directs the play. (138A)

A Producer puts together all the elements required in order that a play can be presented on the live stage. He selects the play. He raises and spends the money for the Production. (114A) He engages the Director. He enters into contracts with all persons needed in the Production, including the Director, scenic designer, actors, publicity people. He is in charge of the business. He rents the theatre. He attempts to build an advance sale. (31A).

During the preparation period, and in fact generally when he is not working with the actors, the Director fixes his own time for working on the play. This was the testimony of Mr. Traube, the defendant's witness. (148A-149A) During the preparation period, the Director may, and frequently does, work on other productions or endeavors. (Ex. 3, 328A) During the rehearsal period, it is the Director who determines which actor to rehearse and when to call rehearsals, and the amount of time to rehearse any of the actors. (85A-86A) It is obviously through rehearsals that there is established the idea of the play and the way it is to be presented to the audience.

(It should be noted that Actors Equity, the union that represents actors, by contract limits the amount of time that an actor may be required to rehearse. Thus, the time that a Director can rehearse actors is delimited by the restrictions on when an actor is available to be rehearsed under his contract. (23A, 103A, 148A-149A)) But within the time that actors are available, the Director sets the time of rehearsal. (23A, 103A, 148A-149A) When a Director is engaged, the Producer generally informs him when the rehearsal period will begin, and as noted above, it will then run about five or six weeks. Within that time area, the rehearsal times are set by the Director. This was confirmed by the defendant's witness, Mr. Richards, president of defendant and a Director, who testified:

> "Well, the rehearsal times are set by me - the actual time was set by me within the time circumscribed by the producer. In other words, he told me in my contract when I should begin rehearsals and the times were set by me in terms I felt would be best to rehearse the play." (85A)

Mr. Richards made the point that he would at times adjust to special circumstances; for example, if the Producer asked for a rehearsal in order to bring in potential investors. But the basic point is not in dispute: within the weeks that rehearsals are to be conducted, and within the limitations of the Actors

Equity contract, the Director sets the times of rehearsal. In fact, the Agreements do not provide for any working hours. (Ex. 2, 297A; 99A)

Although defendant's witnesses claimed that Producers would intrude into the rehearsal process, it is definite from their testimony that the Producer could not control the judgment of the Director. Thus, in response to a question concerning who determined which actor to rehearse, Mr. Schneider, the defendant's witness, testified that a Director was not violating his obligation if he refused to rehearse an actor designated by the Producer. (258A) Since the defendant's witnesses concede that a Director is not obliged to follow the instructions of a Producer, there is no possible basis for claiming that a Producer "retains the right to direct the manner in which the business shall be done."

Defendant's testimony was that there was in effect a "three-cornered partnership" among the Director, the author, and the Producer, who work together to present the play; but that within this "partnership", only persuasion can be used upon the Director, and the Director is not in violation of his obligations if he refuses to follow instructions of a Producer. Thus, Mr. Schneider testified:

"I mean, I (a Director) have to agree to the actors, the author has to agree to the actors, and normally the producer has to agree. It's a three-cornered partnership. The actual contract is signed by the producer." (238A-239A)

And even within this "three-cornered partnership", there is no control over the Director: Mr. Traube testified that it is not cause for discharge of a Director if he refuses to accept a Producer's judgment to replace or not replace an actor. (156A-157A) Certainly no element of a Production can be more important, and the Director is not obligated to accept the Producer's judgment here.

In the course of directing a play, a Director's judgment may differ from that of a Producer. But Mr. Feuer, defendant's witness, testified that when a Director's opinion would be changed by a Producer, it would be by persuading the Director, not by ordering him. (184A, 187A). No witness at any time claimed that a Director was obligated to follow the instructions of a Producer with respect to carrying out his directorial functions. The testimony was to the contrary. Mr. Traube testified at an examination before trial that a Director is not obligated to follow a Producer's instructions:

"Q So when the director refuses to follow the instructions (of a Producer) with reference to either interpretation or rehearsal, he is not in violation of his contract as the Society sees it, is that correct?

"A That's correct." (Ex. 4, 331A)

At no time was any testimony offered to contradict plaintiff's contention that a Director is not obligated to follow the instructions of a Producer. On the basis of the rule in Singer v. Rahn, 132 U. S. 518, which was restated in Taylor, that a master-servant relationship exists "whenever the employer retains the right to direct the manner in which the business shall be done", there is no employer-employee relationship between a Producer and a Director. Since a Director is not obligated to follow the instructions of a Producer, the Director "is not deprived of his judgment in the execution of his duties", and therefore he is an independent contractor.

Defendant contends that Producers and Directors refer to the Agreements as collective bargaining agreements, and use the words "employee" and "employment", and that this is evidence that there is an employer-employee relationship. However, it is the nature of the work and the relationship that is determinative, not the semantics used. " . . . anti-trust jurisdiction cannot be declined simply because independent contractors masquerade as a union." (Bernstein v. Universal Pictures, 2nd Cir #535, Docket #74-61, May 17, 1975.) And the Agreements here actually do not refer to what is usual in collective bargaining agreements. The Agreements refer primarily to financial matters, and not to working hours or working conditions. (Ex. 2, 297A; ~~99A;~~ 109A

Defendant contends that a Director is controlled because he does not want to lose his engagement in a field with a limited amount of work. But opportunities in the theatre are just as rare for playwrights as for Directors, and playwrights would be just as reluctant to lose an opportunity to be produced, but a playwright is an independent contractor. (Ring v. Spina, supra.) "Pressures of economic necessity to work . . . are applicable to every person engaged in a trade, calling or profession for gain and are not relevant considerations in determining whether one is an employee or independent contractor." (Taylor, supra, 595.)

Thus, defendant has agreed, or defendant's witnesses have testified that a Director: during the preparation period fixes his own time for working on the play, and may work on other productions or endeavors; during the rehearsal period determines which actor to rehearse, determines when to call rehearsals, how long to rehearse any actor, was not obligated to accept a Producer's instructions concerning which actor to rehearse; had to agree to the selection of actors; was not obligated to accept a Producer's judgment concerning the replacement of an actor. Even with respect to the interpretation of the play (probably the most important element since that will control how the play will ultimately appear to the audience) defendant's witnesses testified that a Director

is not obligated to follow a Producer's instructions. On the basis of the testimony of defendant's witnesses, the Producer has not retained "the right to direct the manner" in which the work is done; the Director's manner of work is: not subject to control.

POINT III

THAT TESTIMONY OF PLAINTIFF'S WITNESSES WHICH WAS NOT CONTROVERTED BY DEPENDANT ESTABLISHES FACTS WHICH CONFIRM THAT THE MANNER OF A DIRECTOR'S WORK IS NOT SUBJECT TO CONTROL BY THE PRODUCER OR ANY OTHER PERSON

During the period that a Director prepares a play for production, the Director does not have to report to any specific place. He determines for himself where he shall work in the course of preparation. He determines for himself whether and when to meet with the author. This testimony was offered by Mr. Merrick (22A), and was not disputed by the defendant.

Each of the plaintiff's witnesses, Mr. Merrick, Mr. Levin and Mr. Julien, was asked who determined: which actor to rehearse, when to rehearse a particular actor, when to require him to memorize his lines, and when an actor had been sufficiently rehearsed. They all testified that this was determined by the Director. (31A, 37A-39A 70A-71A) They also testified that it is the Director who

determines which scene to rehearse, during what hours to rehearse actors, and the interpretation to give to a play as effected by how lines are read. (70A-71A). None of this testimony was controverted by defendant. Defendant's witnesses did claim that Producers would enter into these areas, but none claimed that a Director was obligated to accept a Producer's determinations; they maintained, on the contrary, that refusal to accept a Producer's decision was not cause for discharging the Director. (Ex. 4, 331A; 100A; 257A-258A). Although they claimed that the Producer would attempt to affect the direction of the play, and would put pressure on a Director to which he might give in, it was by attempting to persuade the Director, not by ordering him, (184A, 187A) and refusal to give in was not a violation of an obligation or cause for discharge. (83A, 238A). Thus, the plaintiff's witnesses testified that the Director himself controls the manner in which he performs his work; and the defendant's witnesses testified that Producers would attempt to persuade Directors, argue with them, intrude in the Director's areas, but that at most it is a "three-cornered partnership", and that a Director is not in violation of his obligations if he rejects the Producer's judgments. (238A-239A) Since a Director has the right to reject a Producer's decisions, there is no control over the Director. Control means the power or authority to

direct or restrain; such power or authority does not exist where there is a right to reject an instruction or direction, and defendant maintains that a Director has that right.

POINT IV

THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH HOLDINGS OF COURT OF APPEALS FOR THE 2ND AND 4TH CIRCUITS

The Court below stated in its opinion that he testimony revealed: that a Producer has final authority with the playwright in the selection of cast; that the Producer may overrule objections by the Director to adding or deleting scenes; and that the Producer has pervasive control over the artistic direction of the play.

It is submitted that under the rule in Taylor and in Ring, the testimony referred to by the District Court does not evidence control over the manner of work of a Director such as to make him an employee; that on the contrary, testimony submitted by defendant establishes that a Director is an independent contractor. Further, it is submitted that the decision is inconsistent with the United States Supreme Court decision in Singer v. Rahn (132 U. S. 518) upon which Taylor is largely based.

There are two significant factors which are submitted as establishing that the decision of the District Court herein is inconsistent with the above cited cases: (1) the evidence presented by the defendant itself is to the effect that where a Producer enters into the artistic direction of the play, he nevertheless does so without any right of control inasmuch as the rules and practice in the industry are that a Director is not required to accept a Producer's judgment; and (2) even if this were not so, the participation by the Producer relates solely to what Taylor (and the other cases hereinabove cited) hold constitutes some reservation of control "in order to accomplish the results contemplated by the parties" (Taylor, supra) and not over the manner of performing work.

The District Court decision refers to testimony by Mr. Richards and Mr. DaCosta to the effect that the Producer attends auditions and has final authority, with the playwright, in the selection of the cast. But Mr. Richards testified that "the decisions (as to which of the actors and actresses would get the parts) were always made in concert." (90A) Mr. DaCosta testified that when he expressed opposition to the employment of a particular actress he was "made to feel responsible" for the final success of the play and so "I capitulated". (118A) Thus,

Mr. Richards testified that a Director was a co-equal of the Producer and playwright, not controlled by either. And Mr. DaCosta's testimony was not that he had to follow orders, but that he was persuaded. As was expressed by another of the defendant's witnesses, Mr. Feuer, a Producer only attempts to "persuade" the Director he does not "order" him. (187A). Mr. Schneider, defendant's witness, testified:

> "I help to choose the actors. I mean, I have to agree to the actors. The author has to agree to the actors, and normally the Producer has to agree. It is a three cornered partnership." (238A-239A)

Thus, the defendant did not even offer testimony that a Director is required to follow directions of a Producer. The testimony is, on the contrary, that the Producer does not have final authority. At the most, the testimony of defendant's witnesses is that three people, the Director, the Producer and the playwright, have joint and equal authority and in Mr. Schneider's words, all must agree. Inasmuch as the defendant's witnesses point out that the Director himself must agree, under the rule of Taylor, the Director is not an employee. A Director is not obligated to accept the judgment of a Producer even on whether to replace or not replace an actor. It is submitted that the Court erred in stating that a Producer had final authority in selection of cast. Defendant's witnesses establish that a Director may reject a

Producer's judgment.

The decision below also referred to the Producer adding or deleting scenes and overruling objections raised by the Director, and stated that the Producer has pervasive control over the artistic direction of the play. But the testimony of defendant's witnesses is not that the Producer has control but that he attempts to persuade the Director, and that his participation in the artistic presentation is without any right to require acceptance of his judgments. Thus, Mr. Feuer stated specifically that when he does not like something that a Director is doing, the method is one of persuasion, it's not a case of giving an order that the Director must obey. (187A) And even in those areas of persuasion it is not over the manner in which work is done, it is with respect to the outcome of the play. The independent contractor status is not destroyed even if the person for whom the work is done exercises such control as is necessary to accomplish the results contemplated by the parties. (Taylor) The manner in which the Director performs his work would not be controlled even if the Producer had these other controls.

It is this principle that to constitute an employer-employee relationship there must be a right to control "the manner" in which the work is done which establishes that a Director is an independent contractor

even if the Producer did participate in the production of the play to the full extent claimed by defendant. The rule is stated in Singer v. Rahn (132 U. S. 518, 523) which is hereinabove cited in Taylor:

> "Complete control over the result to be accomplished is not enough to make an independent contractor an employee. . . .
>
> "Even some reservation of control to supervise the manner in which the work is done, or to inspect the work during the performance does not destroy the independent contractor relationship where the contractor is not deprived of his judgment in the execution of his duties."

At no time did the defendant deny testimony that the Director determines for himself when to meet with the author, which actor to rehearse, how long to rehearse an actor, when to call rehearsals during the five weeks of rehearsal time, when to require an actor to memorize his lines as opposed to reading from the script, which scene to rehearse, whether to make written notes. Nor did defendant deny that the Director sets his own time to work during the preparation period, and does not have to report to any specific place; that a Director may reject a Producer's judgment concerning which actor to rehearse; that stage business developed by the Director in the course of his work on a play belongs to the Director. Thus, even if the Producer did make the decisions concerning adding or deleting scenes, or parti-

cipate in the other ways referred to in the District Court decision, this might constitute control over "the result", or inspection of the work during the performance, but does not constitute control, or "the right to direct the manner" in which the work is done.

The practice in the theatrical profession establishes what are and what are not the obligations of a Director with respect to the manner of his performing his work. Thus, Mr. Richards, president of the defendant, testified that a Director could be discharged "for cause" if he came to rehearsal in a condition unable to direct, or failed to show up for rehearsals, or if he was physically abusive. (99A-100A) But, significantly, the defendant's witnesses testified that it would be discharge "not for cause" if a Producer discharged a Director because: a Director rejected a Producer's decision with respect to how the work should be done, for example: as to whether to replace or not to replace an actor (156A-157A) or which actor to rehearse (Ex. 4, 331A-333A) or concerning the interpretation of the play as expressed in the Production. (Ex. 4, 331A-333A)

The position of the defendant and the testimony of the defendant's witnesses are that if a Director rejects the judgment of a Producer with respect to the

manner in which the Director carries out his functions (including even the most basic functions such as which actor to direct, whether to replace an actor, which scene to direct) and if the Producer discharges a Director therefor, the discharge is deemed "not for cause". (Ex. 4, 331A-333A; 156A-157A; 257A-258A)

The parties agreed, and Mr. Richards testified:

> "If the director is discharged for cause, it is the practice in the industry that that director is not paid beyond that point. If the director is discharged without cause, then we expect and it is the practice in the industry, that the director is compensated as though he had not been discharged." (94A)

Thus, independently of the evidence set forth in the preceding Points herein, the position of the defendant and the testimony of its witnesses confirm that a Producer does not control the manner in which a Director performs his work. If the Producer had the right to control the Director, the Director would be obligated to follow the instructions of the Producer. There is no dispute but that where a Director violates his obligations, he may be discharged "for cause" and would therefore not have to be paid. There is similarly no dispute but that a Director's rejection of a Producer's

judgment does not constitute grounds for discharge "for cause". (257A-258A) Mr. Traube testified to this very explicitly at an examination before trial:

> Q I am directing ourselves to one very narrow point now and that is when a director refuses to follow the instructions of a producer in one of these areas that we have discussed such as interpretation of the play, the rehearsal of an actor. You have stated that the producer may dismiss him, but you have also stated that he must nevertheless pay him as though he had not dismissed him. Is that correct?
>
> A That is my understanding. (Ex. 4, 332A)

The position of the defendant and the testimony of the defendant's witnesses is that a Director is not obligated to accept the instructions of a Producer concerning the manner in which the Director does his work. Thus, the Director "is not deprived of his judgment in the execution of his duties." (Taylor v. Local 7, supra) An employer-employee relationship exists when "the employer retains the right to direct the manner in which the business shall be done, . . . " (Singer v. Rahn, supra) The unqualified testimony of the defendant's witnesses is that the employer does not have that right, since there is no obligation upon the Director to accept the Producer's

directions or instructions. One of the defendant's witnesses pointed out the difference in the rights of control in the theatre over a Director as contrasted with the right of control over an actor. The parties are in agreement that an actor is an employee. Mr. Feuer testified:

> "I know that with an actor, for instance, if you tell an actor to do something he does not want to do it, you don't have to pay him, you can fire him without paying him." (177A)

But with respect to a Director, Mr. Feuer testified that where persuasion does not work, a Producer could discharge a Director, but:

> "Q But if he did let the director go he would have to pay him under the rules of the industry now, is that right?
>
> "A Yes.
>
> "Q He would have to pay him as though he had not let him go, that is the rule now, is it not?
>
> "A Yes." (186A).

In short, the right to direct the manner in which the business is done is retained with respect to an actor and is not retained with respect to a Director.

The agreed statement of facts, (Ex. 3, 328A) refers to this matter in paragraphs 11 and 12 thereof. At the trial, the parties agreed to an amendment to these two paragraphs, so that as amended, they read:

(11) "If a producer discharges a director without cause, it is the Society of Stage Directors and Choreographers policy that the director is entitled to his full compensation. If a director is discharged for cause, it is the Society of Stage Directors and Choreographers policy that he is not entitled to the compensation that would have accrued had he not been discharged.

(12) "A producer may, at will, dismiss a director without cause, but it is the Society of Stage Directors and Choreographers policy in such event that the producer must pay the director in full fees and royalties that the director would have received had he not been dismissed." (54A)

The District Court decision does not deal with the issue raised by the requirement under the practice in the industry and the position that Directors be paid in full when they are discharged for failure to comply with the instructions of the producer. The rule on that issue, it is submitted, proves that Directors are independent contractors.

In the event of a disagreement between the Producer and the Director, the latter may be persuaded that the Producer is right, he may defer to the wishes of the Producer even if he thinks these are less acceptable artistically than his own, or he may insist on

doing things his own way. The decision as to which option will be adopted is exclusively that of the Director. If he refuses to comply with the Producer's instructions, by the rules and practices of the industry and the defendant, there is no way by which he can be compelled to follow instructions. There is no right of sanction and no method of exercising control. The only recourse of the Producer is to discharge the Director, but under the practice existing in the industry, this gives no control whatsoever. The Director retains all the benefits paid to him in the past and is entitled to every last one of the benefits payable in the future. This is because he has no obligation to accept a Producer's instructions. (As above noted, where he violates his obligations he is not entitled to be paid.) A right to discharge a person upon condition that he is paid as though he were not discharged can give no control.

(It should also be noted that customarily in all industries, the person for whom the work is done has a right to discharge the person doing the work; e.g., a client can discharge a lawyer, a patient can discharge a doctor, an owner can discharge a building contractor. But their manner of performing work is not controlled and they are, therefore, independent contractors.)

In the case of a Director, if he is discharged for refusing to accept orders from a Producer concerning his direction of a Production, he is paid in full. This means he is not violating his obligations in refusing to accept a Producer's orders; the practice in the industry does not require him to accept orders. He is therefore not subject to control.

It should be noted that the fact that the practice in the industry requires a Director to be paid in full if discharged "not for cause" is not per se the reason for maintaining that a Director is an independent contractor. But the fact that a Director is entitled to be paid if discharged for rejecting a Producer's instructions (which would therefore be discharge "not for cause") means that there is no obligation under the practice in the theatre industry that a Director follow the instructions of a Producer. It is that fact which establishes that a Director's manner of performing his work is not subject to control. Although a Producer may come to rehearsals, or may inform the Director of what he believes should be done in certain areas, the Director "is not deprived of his judgment in the execution of his duties" (Taylor) and therefore is an independent contractor. Since the Director has no obligation to accept a Producer's decisions, the Producer cannot have retained "the right" to control.

POINT V

A DIRECTOR'S OWNERSHIP OF HIS WORK PRODUCT (STAGE BUSINESS) CONFIRMS HIS INDEPENDENT CONTRACTOR STATUS

Ownership of "stage business" confirms a Director's independent contractor status. "Stage business" is action in the play which is not in the dialogue; it is the movements around the stage by the actors, and actions with props which generally are not in the script. (27A, 38A) Developing stage business is a fundamental function of the Director for which he is engaged, since, in Mr. Traube's words, he must guide actors through rehearsals. (154A) If an actor were an employee, stage business (his work product) would be owned by his employer. ". . . it is an accepted principle of both statutory and common law copyright that the employer is deemed to be the author of works made for hire." (Nimmer on Copyright, Section 62.2) But it is the property of the Director, as explicitly stated by both Mr. Traube (155A)and Mr. Richard's (101A). This can be only because a Director is an independent contractor.

POINT VI

CONTROL OF A BUDGET DOES NOT CONSTITUTE CONTROL OVER THE MANNER OF DOING WORK

The core of the decision below is that a Producer exercises control over the budget, and that if

the Producer will not make monies available for something the Director wants to do, then the Director cannot accomplish his wish. But this in no way constitutes control over the "manner" in which a Director performs his work. In every industry and in every profession, without exception, it is obvious that the amount of money available limits what can be done. This necessarily applies in every case where the person doing the work admittedly is an independent contractor. A lawyer may tell his client that it is most urgent to engage a private investigator in a case; if the client refuses to spend the money the lawyer cannot engage the investigator. He certainly remains an independent contractor. An architect or a building contractor may urge the owner to allow a crew to be worked overtime to complete construction before weather difficulties, but if the owner refuses to spend the money for overtime pay, the crew will not be worked overtime; the architect and the general contractor remain independent contractors. The manner in which they carry out the work within the budget limitation is not controlled. A playwright is an independent contractor (Ring v. Spina, supra) and usually participates in the course of the work on the Production. But he cannot spend money and is limited by the budget

as is everyone else. Similarly, with a Director: he is required to keep within the budget available, (as, indeed, must the Producer himself). But within the budget limitation, the Director controls his own manner of work and therefore is an independent contractor.

If limiting the budget were to change a person's independent contractor status there would be no such status in commerce or in the professions as an independent contractor. With respect to a Director, it is submitted that all the testimony establishes that a Director, within budget limitation, controls his own manner of work; he has no obligation to follow the instructions of the Producer.

POINT VII

CONCLUSION

Actions or agreements in restraint of trade are illegal unless there is an employer-employee relationship. In order for there to be an employer-employee relationship between a Producer and a Director, it would be necessary that the Producer have "the right to direct the manner in which the business shall be done"; and the independent contractor relationship is not destroyed "where the contractor is not

deprived of judgment in the execution of his duties." (Taylor supra.) In the instant case there is no claim by any witness on either side that a Director violates his obligation if he rejects the judgment of a Producer. The testimony submitted by both parties is exactly to the contrary: the Director has the right to reject a Producer's judgment. It is submitted, therefore, that a Director is an independent contractor and not an employee. The defendant is therefore subject to provisions of the Sherman Act, and the defendant's violations thereof, both in the agreements and in the defendant's actions, are unlawful.

Respectfully submitted,

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